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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 951

TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

MRS. THOMAS F. ALLEN, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTION PRESENTED FOR REVIEW

The question here presented for review is whether the well defined principle adopted by the Texas Supreme Court in the *Webster*[1] case properly applies to the facts of the case at bar.

1. *Texas-Louisiana Power Co.* v. *Webster*, 127 Tex. 126, 91 S.W.2d 302 (1936).

STATEMENT OF THE CASE

This case involves the reversal by the Court of Appeals of a summary judgment entered by the District Court against Respondents in a diversity case involving the interpretation of local law. Petitioner's Statement of the Case is correct with the exception of one significant omission. Petitioner operated and maintained *only* an electric power line over the particular area where Thomas Floyd Allen was electrocuted, and at the time of the accident Petitioner admits that the line was maintained at a height in violation of statutory requirements (App. 52, Supp. App. 78; Art. 1436a, *Tex. Rev. Civ. Stat.*).

THE OPINION BELOW

The opinion of the Court of Appeals is reproduced as Appendix A to Petitioner's Brief and is reported at 430 F.2d 982. It correctly applied the applicable Texas law imposing a duty of ordinary care upon anyone who operates electric power lines under a grant of easement as against anyone who might reasonably be anticipated to come in contact with the line, regardless of the technical question of status of the injured party viz-a-viz the fee owner of the realty.

ARGUMENT AND AUTHORITIES

The Webster Rule and Its Evolution

The Court of Appeals operated wholly within the framework of the pronouncements of the Texas Supreme Court in *Webster* when it reversed the summary judgment of the District Court. In view of the strident reliance by Petitioner upon such pre-*Webster* decisions as *Patton*,[2]

2. *Denison Light & Power Co.* v. *Patton*, 105 Tex. 621, 154 S.W. 540, 542 (1913).

Pitts,[3] and *Morton*,[4] we believe a brief analysis of the evolution of *Webster* is in order.

The feudalistically inspired trespasser defense was inculcated into Texas jurisprudence by the court in *Galveston Oil Co.* v. *Morton*.[5] This case involved a situation where the plaintiff was injured when he went upon the premises of the defendant's plant in search of one of the defendant's employees. While wandering around on the premises, the plaintiff stepped into a floor level revolving seed conveyor and was injured. The court held that the owner of the mill was not liable for the plaintiff's injuries on the theory that the owner owed no duty to the plaintiff whom he had neither expressly nor impliedly invited onto the premises of his *lawful* business.

Morton was unwisely expanded to an uninsulated electrical wire in *Pitts*. However, in the wake of results such as *Pitts*, together with an increasing awareness of the propensity of harm of electricity as such, a cleavage of authority developed. Many enlightened jurisdictions over the land came to recognize that one maintaining an instrumentality so insidiously deadly as uninsulated high tension power lines should not be insulated from liability for its misuse simply because the victim could technically be considered a trespasser as to the landowner. For an excellent collation of these cases, we refer to 26 *Am. Jur. 2d* 276, Electricity, Gas & Steam, §70 (1966) and the cases noted therein.

In the mid-1920's Vermont came into the fold via a probing opinion by its Supreme Court in the case of *Humphrey* v. *Twin State Gas & Electric Company*, 100 Vt. 414,

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3. *City of Greenville* v. *Pitts*, 102 Tex. 1, 107 S.W. 50, 51 (1908).

4. *Galveston Oil Co.* v. *Morton*, 70 Tex. 400, 7 S.W. 756 (1888).

5. Id.

139 Atl. 440. The authorities, pro and con, on the subject are analyzed, and the Court then wisely observed:

> "Electricity has come to be a necessary factor in almost all lines of activity. Its usefulness should not be impaired or curtailed. But it is highly destructive when it escapes control; its capacity for harm is but little reduced by distance; it is invisible and undiscoverable; it strikes instantly and without warning. We deem it of the highest consequence, especially in a rural state like ours where hunters, fishermen, and others roam the woods when lawful, almost at will, and where high-tension electric lines run in every direction, and wire fences are in common and increasing use, that those dealing in such a deadly agency should be accountable to all whose likelihood of injury could reasonably be foreseen."

In 1936, the Supreme Court of Texas adopted this principle in *Webster*, thereby creating the exception to the harsh trespasser defense recognized and applied by the Court of Appeals below.

Able counsel for Petitioner rely on a number of non-electrical cases involving property *lawfully* occupied by railroads in order to create the illusion that because Petitioner is a railroad rather than a power company, *Webster* does not apply.[6]

Such cases can afford no comfort for the Petitioner here. The Court of Appeals could have become embroiled in trying to determine if a difference exists under the Texas law in the possessory rights granted under a

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6. *Dobbins* v. *Missouri, Kansas & Texas Ry. Co.*, 91 Tex. 60, 41 S.W. 62, 63 (1897); *Missouri, Kansas & Texas Ry. Co.* v. *Edwards*, 90 Tex. 65, 36 S.W. 430, 431 (1896); *Missouri Pacific Railway Co.* v. *Hance*, 310 S.W.2d 374, 376 (Tex. Civ. App., 1958); *Uvalde Rock Asphalt Co.* v. *Asphalt Belt Railway Co.*, 267 S.W. 688, 689 (Tex. Com. App., 1925); *Ft. Worth & D. C. Ry. Co.* v. *Craig*, 176 S.W. 827, 829 (Tex. Civ. App., 1915, no writ); and *Millmen Union* v. *Missouri-Kansas-Texas Railroad Co.*, 253 S.W.2d 450, 454 (Tex. Civ. App., 1952, writ ref., n.r.e.).

right-of-way easement to a railroad as opposed to electrical power companies. But, in effect, the Fifth Circuit has held that even if such exists, they are differences that do not distinguish. Instead, the Court of Appeals' opinion recognizes and adheres to the underlying policy of the *Webster* decision, and, as the opinion states, this renders it unnecessary to consider whether Allen was a trespasser as to the easement estate in this case.[7]

The entire matter is summed up in *Webster* as follows:

> "The power company under its easement or right of way deed, *and under the law*, had a right to maintain its power line over and on this land, but it had no authority under such deed, *or under the law*, to maintain its line at the point above the ground where this wire was at the time these men were killed by it." 91 S.W.2d 307 (emphasis ours).

The point is that the Petitioner was not a legal occupant of the space where Thomas Floyd Allen met his death. It was making an illegal use of its easement, and the price it pays under the Texas law is deprivation of the trespasser defense.

It is of interest that the seeds of the *Webster* exception to the trespasser defense were borne by its creator. In enunciating the trespasser doctrine in the *Morton* case, the Texas Supreme Court held:

> "The doctrine is established by the above and many other cases that a trespasser or mere licensee who is injured by any dangerous machine or contrivance on the land or premises of another cannot recover damages *unless the contrivance is such that the owner may not lawfully erect or use*, . . ." 7 S.W. at 758 (emphasis ours).

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7. Opinion of the Fifth Circuit of Appeals, footnote 4, 430 F.2d at 984.

The "unless" of *Morton* is precisely what the Petitioner was doing when Allen met his death under the unlawfully maintained electrical transmission lines.

Petitioner clamours loudly over the Court of Appeals' reliance upon the intermediate Texas court's opinion in *Razo*.[8] Suffice it to say that *Razo* was reversed by the Texas Supreme Court by reason of one of that body's not infrequent schizophrenic reactions which have caused some cynics to refer to it as the Texas Supreme Jury.[9] There is not the slightest suggestion by the Supreme Court in its opinion in *Razo* to indicate it disapproved of the quoted portions of the intermediate Texas court's opinion relied upon by the Court below. It simply held that under the law as pronounced by the intermediate Court of Civil Appeals there was no jury issue to be determined.[10]

CONCLUSION

It is indeed incongruous that this Court's valuable time must be consumed in this mundane diversity proceeding. The Court of Appeals has applied the local law precisely in the terms of the utterances of the Texas Supreme Court on this subject. A Summary Judgment would have been no more tenable had this case been filed in the state court as in its present posture. The Court of Appeals' decision correctly interpreted the local law and applied it to the

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8. *Phillips Pipe Line Company* v. *Razo*, 409 S.W.2d 565 (Tex. Civ. App., 1966), rev'd on other grounds, 420 S.W.2d 691 (Tex., 1967).

9. *Earl R. Deen* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 353 U.S. 925, 1 L.Ed.2d 721, 77 S.Ct. 715 and *Jay Lee Gibson* v. *Guy A. Thompson*, 355 U.S. 18, 2 L.Ed.2d 1, 78 S.Ct. 2, reh. den. 355 U.S. 900, 2 L.Ed.2d 197, 78 S.Ct. 258.

10. Contrary to the innuendo in the petition, it should be noted that the Fifth Circuit was not unaware of the Texas Supreme Court's reversal of *Razo* when it cited the intermediate Texas Court's opinion as the applicable law in Texas. See opinion of the Fifth Circuit of Appeals, fn. 10, 430 F.2d at 985.

facts, and the Petition for Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Respondents in Opposition was mailed, postage prepaid, properly addressed to Mr. Jack W. Flock, P. O. Drawer 629, Tyler, Texas, Attorney for Petitioner, and upon Mr. James N. Phenix, P. O. Box 1108, Henderson, Texas, as attorney for John Floyd Allen, et ux., and upon Mr. Brady Coleman, P. O. Box 312, Longview, Texas, as attorney for Intervenor this the ..... day of ....., 1970.

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Of Counsel